91-202

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NO.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

RICHARD H. LAUGHINGHOUSE,

Petitioner,

v.

STATE OF NORTH CAROLINA, EX REL.
NORTH CAROLINA PORTS RAILWAY COMMISSION,

Respondent.

Petition for Writ of Certiorari
to the Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A state statute creates a cause of action by a railway worker against his employer for damages arising from injuries at work. The Federal Employer's Liability Act (F.E.L.A.) creates a similar cause of action, and jurisdiction in federal courts, where the injury occurs in interstate or foreign commerce. However, suit in federal court is not available to Petitioner, because the employer, which is the State of North Carolina, relied on Eleventh Amendment immunity.

The highest state court has upheld dismissal of Petitioner's claim under state law, in a state forum, on the grounds that the state statute is preempted by the F.E.L.A.

The question presented is as follows: does the F.E.L.A. deprive the state forum of subject matter jurisdiction by preempting a substantively similar state statute, so as to bar the Petitioner, a state-employed railway worker, from maintaining a state tort claims action, particularly where suit under F.E.L.A. in federal court is not available to this Petitioner because of the employer's Eleventh Amendment immunity?

It is noted that the foregoing is related to issues presently before this Court in the case of Kenneth Hilton v. South Carolina Ports Railway Commission.

PARTIES TO THE PROCEEDING

The only parties to the proceeding in the court whose judgment is sought to be reviewed (North Carolina Court of Appeals) are named in the caption here: Richard H. Laughinghouse, as Petitioner, and the State of North Carolina, ex rel. North Carolina Ports Railway Commission, as Respondent.

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GROUNDS FOR JURISDICTION

The decision of the North Carolina Court of Appeals was entered on January 15, 1991, dismissing Petitioner's action. The Supreme Court of North Carolina denied a timely petition for discretionary review on May 2, 1991. (Certification date: May 6, 1991.) No motion for rehearing was filed. There have been no motions submitted to this Court for extension of time within which to file this Petition for Writ of Certiorari.

Jurisdiction to conduct the requested review is conferred upon this Honorable Court by 28 U.S.C. Sec. 1257(3) to review a decision of a state court where the validity of a state statute is drawn into question on the grounds of its being repugnant to federal law.

STATUTES INVOLVED IN THE CASE

Federal Employer's Liability Act
(45 U.S.C.S. Sec. 52 et seq)

North Carolina General Statutes,
Sec. 62-242

The pertinent text of each statute is contained in the Appendix to this Petition.

STATEMENT OF THE CASE

This matter involves an action for damages arising out of an on-the-job injury to a railway worker employed by the State of North Carolina at the switching yard at a State Ports Authority facility. Under state law, the forum would not be state civil courts but would be the North Carolina Industrial Commission sitting as a tribunal to hear tort claims against the state.

The Petitioner was injured "throwing a switch," a maneuver in which the railway employee manually moves the switch using his arms and body weight, which in turn moves the rails, to switch traffic from one track to another.

The switch in question had become defective, such that it would not swing freely and required maintenance. The switch had been recently complained of to the engineer but had not been oiled or otherwise repaired. The Petitioner, working in the rain, could not see that the switch had not been repaired and injured his knee while attempting to throw it.

The Petitioner had been employed as a railway employee for 15 years. Railway employees are required to jump off moving trains, climb ladders on freight cars, turn brake wheels, and engage in other extreme physical exertions. Prior to the accident, the Petitioner was described by Respondent's witness as a "go-getter" and "a good railway

employee." As a result of the injury, the Petitioner is permanently injured, unable to perform those duties. The Petitioner has attempted to obtain other railway employment but has been denied it because of his medical condition. The Petitioner was 47 years old at the date of the injury; expert testimony established his discounted lifetime earnings loss, based on lower-paying employment, to be in excess of $100,000.

Petitioner initially filed a negligence action in U.S. District Court under F.E.L.A. and was on the trial calendar in the Eastern District of North Carolina when the case was dismissed on grounds of Eleventh Amendment immunity. The District Court relied on

Welch v. St. Dept. of Highways and Public Transportation, 438 U.S. 468 (1987).

Petitioner then filed his negligence action in a state forum, premised on the common law duty of a railway employer to provide a reasonably safe work place as codified in a state statute substantively similar to the F.E.L.A. The particular forum was the state Industrial Commission, sitting as a court under specific statutes providing for tort claims against the state arising out of state law.

Prior to trial, the Respondent moved to dismiss on the grounds that Petitioner was engaged in interstate or foreign commerce and therefore federal preemption by F.E.L.A. deprived the

Commission of subject matter jurisdiction.

The federal preemption issue was timely and fully briefed, argued and passed on by the North Carolina Court of Appeals. That court concluded that Petitioner was engaged in interstate or foreign commerce. It then, in reliance on a 1917 decision by this Court, affirmed a dismissal expressly based on lack of subject matter jurisdiction, on the grounds that the F.E.L.A. preempted all state remedies. Petitioner sought discretionary review in the highest state court, the Supreme Court of North Carolina, which declined to grant discretionary review.

REASONS FOR GRANTING WRIT

The state and federal statutes, both enacted in the 1890's, were remedial in nature. They were designed to protect railway workers, recognized to be at high risk for injury, from abuses of the fellow-servant rule, contributory negligence and assumption of risk. The F.E.L.A. was made applicable to dock workers and seamen by the Jones Act, 46 U.S.C.S. Sec. 33.

The effect of the decision below is to deprive that portion of those workers who happen to be employed by a state-owned facility of recourse under state law, based on an erroneous application of the doctrine of federal preemption.

Such workers are now told by one court that they cannot sue in federal

court because of the Eleventh Amendment immunity, i.e., Welch, supra, and told by another court that they cannot sue in a state forum because federal law has preempted the state remedies. (Appendix, p. 36)

Prior to Welch, a sweeping, all-inclusive philosophy of federal preemption was consistent with trial practice, by which essentially all railway and dock worker injury cases were for practical reasons tried in federal court. (Its judges, for example, were comfortable with comparative negligence.) After Welch, such workers are barred from federal court.

A decision such as that of the North Carolina courts has the anomalous effect of barring them from state forums as well. If such a catch-22 is

allowed to prevail, the effect on the injured employees is not simply a jurisdictional dispute, but the complete loss of a forum in which to be heard.

The federal preemption, which the state courts found in this case in deference to past decisions of this Court, is entirely illusory if railway workers, who are supposedly protected from state law by the preemptive federal law, are unable to claim the benefits of the federal law.

The result, ironically, is that the injured rail workers who happen to be employed by a state are jurisdictionally worse off than before the F.E.L.A. was enacted almost a century ago. Such a result was surely not intended by Congress or by any of the courts which have addressed the issue.

It is respectfully submitted that the 1987 reexamination of Eleventh Amendment immunity in Welch, coupled with the current examination of the applicability of F.E.L.A. to states, in Hilton, should be complemented by a corresponding mid-course correction of the erroneous application of federal preemption relied on by North Carolina courts in this case.

This Petition will show that the North Carolina court's understanding of preemption is not only inconsistent with the language of the F.E.L.A., but also with the concept of cooperative federalism by which state law is not held to have been preempted unless it is contradictory and repugnant to the federal law. Here, the two laws are

neither contradictory nor repugnant, but are entirely compatible.

I. THE F.E.L.A. ITSELF CONTAINS NO EXPLICIT CONGRESSIONAL STATEMENT OF AN INTENT TO PREEMPT.

Congressional intent to preempt must be found before concluding that there has been federal preemption. There is no explicit statement of preemptive intent in F.E.L.A. That is, the F.E.L.A. does not say that it preempts state law. There is no inference that it does so. In a federal system, there is an inference to the contrary. Federal legislation which intends to preempt can easily enough, and often does, simply say so.

The lack of such a stated congressional intent in F.E.L.A. was noted in

Rogers v. Consolidated Rail Corp., 688 F.Supp. 835 (N.D.N.Y. 1988).

The state and federal statutes are substantively similar. (See Appendix, pp. 49 and 57) In such a case, there is even less reason to presuppose any federal intent that the railway worker would be protected by federal law rather than by state law.

II. THE STATE AND FEDERAL STATUTES ARE NOT CONTRADICTORY AND REPUGNANT.

The effect of the North Carolina decision is that N.C.G.S. 62-242 and associated state common law allowing suit by a railway employee in a state forum are nullified by the F.E.L.A. on the theory of federal preemption. The North Carolina decision specifically relied on New York Central Ry. Co. v.

Winfield, 244 U.S. 147. It is submitted that such reliance was misplaced.

Federal preemption is a matter of grave importance and is not presumed to have occurred. The doctrine of federal preemption is to be applied only where following the state law would obstruct a clear federal objective and where there is a recognized federal supremacy. The doctrine does not apply unless federal law has clearly been shown to have superseded state law.

In some cases, such as Winfield, supra, during the early years of this century, in a time of limited federal activity prior to the New Deal, the appellate courts often concluded federal preemption to have occurred simply by virtue of there being a federal

statute on the subject. This was the result of what one treatise writer calls a "very rigid" analysis in which "the fact that both laws might be totally compatible had no bearing on the issue." Administrative Law, Vol. 1, Section 2.01, pp. 2-6. In the instant case, however, the state and federal laws are "totally compatible."

Cases such as Winfield, supra, followed this "very rigid" analysis to the effect that since there was a federal statute on the subject, there was preemption per se.

The preemption per se theory followed in Winfield is not the law of this case. It was not what was anticipated at the founding of the federal system, and it is not the law today. When the doctrine of federal preemption

was first envisioned in The Federalist, No. 32, p. 241 (B. Wright Ed. 1961), it was anticipated that federal preemption would occur only if the particular federal law and state law were so mutually inconsistent as to indicate that "conflicts will necessarily arise" and constitute "immediate constitutional repugnancy."

Specifically addressing federalism in the case of Goldstein v. California, 412 U.S. 546, this Court established strict standards for finding a state law to be in contravention of federal law. Under Goldstein, to find federal preemption a court must be convinced not only (1) that Congress intended the preemption, but also (2) that concurrent state authority would cause a

conflict that is "contradictory and repugnant."

Goldstein not only quoted The Federalist, but made it the law of the land. It reaffirmed Cooley v. Board of Wardens, 12 How. 299 (1852) in premising preemption on constitutional repugnancy. A specific intent of Congress to preempt state laws such as N.C.G.S. 62-242 has not been made "manifestly clear," and the similarity of such laws to the F.E.L.A. indicates that they are not "contradictory and repugnant."

Under "cooperative federalism" there is a "strong presumption in favor of the validity of state law." Administrative Law, supra, at pp. 2-22. The presumption should be particularly strong when the objectives and language of the two enactments are so similar.

III. PREEMPTION SHOULD NOT BE APPLIED WHERE THE PETITIONER IS BARRED FROM PROCEEDING ON THE FEDERAL LAW IN FEDERAL COURT ON OTHER GROUNDS.

There is particularly no reason to find preemption by the federal law when the class of workers affected as a practical matter cannot rely on the federal law.

The Petitioner was on a trial calendar in federal court when his case was dismissed based on Welch. Now it is argued by the defendant that Petitioner is not only barred from a claim against the state in federal court, but is also barred from a claim in the proper state tribunal because there is a preemptive federal law.

The illogic and inequity of barring a state claim on grounds of federal preemption in a similar situation was

noted in Rogers, supra. There the worker could not sue under F.E.L.A., which does not have foreign application, because he was injured in Canada. The court there ruled that recovery under the law of the state where he was employed was not preempted, because to allow such recovery under state law would not conflict with the operation of federal law. As the court stated in Rogers:

> . . . it is inconceivable that Congress intended the F.E.L.A. to preempt an injured railway worker from seeking a remedy under state law when the F.E.L.A. itself is not applicable and does not provide a remedy. The only reasonable inference is that Congress intended to permit such a worker to seek recovery elsewhere.

Similarly, in the instant case, it is inconceivable that Congress intended the F.E.L.A. to preempt a remedy under

state law where the Eleventh Amendment prohibits a remedy under federal law. There is no basis for concluding that federal law, on which such workers cannot rely because of the identity of their employers, was intended to preempt them from proceeding under state laws with which it is not in conflict. The most reasonable inference is that Congress intended that such workers be allowed to seek recovery somewhere. In the instant case the proper forum is the one from which Petitioner has been dismissed.

CONCLUSION

In the wake of Welch, supra, barring Petitioner and other state-employed railway and dock workers from federal court, this case presents an

issue crucial to that whole class of workers.

This case presents as well the broader concern of preserving a substantial jurisdictional right reserved by the states and their citizens. That right is the right to have concurrent legislation without excessive application of the preemption doctrine. Specifically, it is the right to keep open a forum in which a railway or dock worker who happens to be a state employee may seek relief for bodily injury, under the common law as modified by state statutes substantively similar to F.E.L.A.

Particularly, after Welch, the Winfield view is an incorrect application of the preemption doctrine. The idea of preemption by F.E.L.A. should

be reexamined in light of the cooperative federalism illustrated by Goldstein. Petitioner submits that these circumstances present a proper case for a Writ of Certiorari, which action he respectfully requests.

This the 24th day of July, 1991.

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NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. NO. TA-10699

RICHARD H. LAUGHINGHOUSE,
Plaintiff

v.

NORTH CAROLINA PORTS
RAILWAY COMMISSION,
Defendant

DECISION AND ORDER

BY

ERNEST C. PEARSON
CHAIRMAN

FILED: DECEMBER 30, 1988

This case was heard by the undersigned in Beaufort, North Carolina on August 8, 1988. Following the later receipt of memoranda of law from the parties, the record in this matter was closed and this case was ready for decision.

A P P E A R A N C E S

Plaintiff: DeBANK, McDANIEL, HEIDGERD, HOLBROOK & ANDERSON, Raleigh, N.C.; William E. Anderson appearing

Defendants: Johnston & Lambeth, Wilmington, N.C.; Robert White Johnson appearing.

* * * * * * * * * * * * * *

O R D E R

In defendant's Answer to plaintiff's complaint, defendant moved to dismiss this action for failure to

state a cause upon which relief can be granted, such Motion obviously being pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Based upon the Affidavit filed by the plaintiff and the Motion to dismiss in this regard, it is found as a fact that plaintiff's Affidavit does allege sufficient claims of negligence on the part of an employee of an agency of the State of North Carolina as required by N.C.G.S. Section 143-297. Based upon this finding of fact, it is concluded as a matter of law that plaintiff's claim does state a cause of action upon which relief could be granted.

IT IS THEREUPON ORDERED that defendant's Motion to dismiss this action pursuant to Rule 12(b)(6) of the North

Carolina Rules of Civil Procedure is DENIED.

O R D E R

There is also pending before the undersigned, a Motion to dismiss this action based upon an argument by defendant that the exclusive remedy for this plaintiff is recovery under the North Carolina Worker's Compensation Act and not under the Tort Claims Act.

The undersigned has carefully reviewed the record in this matter in regard to this Motion. Specifically, the undersigned has carefully considered the excellent briefs which were filed in this cause by the counsels for the parties on this issue. Based upon this, it is found as a fact that plaintiff is an employee of the North Carolina Ports Railway Commission which

Commission is an agency of the State of North Carolina which operates a railway operation on the premises of the North Carolina Ports Authority. It is further found as a fact that this injury occurred during the activities of the plaintiff as an employee of defendant which injuries were alleged to be the result of negligence maintenance of railway switches by agents of the defendant.

N.C.G.S. 62-242, referred to as North Carolina's "mini-F.E.L.A." was enacted in 1897. This statute specifically allows suits by employees of railroads against their employer in tort for injuries which occur on the job and arise out of the negligence of the employer. Further, this mini-F.E.L.A. statute provides for a

standard of comparative negligence in adjudicating such cases as opposed to the common law standard in this state of contributory negligence. Absent the existence of the North Carolina Worker's Compensation Act, it would in all likelihood be uncontested that an employee such as plaintiff was properly bringing suit in this cause.

Approximately 32 years later in 1929, the General Assembly adopted the North Carolina Worker's Compensation Act. N.C.G.S. 97-1, et. seq. The Worker's Compensation Act contains a provision in N.C.G.S. 97-13 providing in pertinent part that "this article shall not apply to railroads or railroad employees nor in any way repeal, amend, alter or affect Article 8 of Chapter 60 or any section thereof

relating to the liability of railroads for injuries to employees..." It is obvious from the language of this provision of the Worker's Compensation Act that it was never intended that the Worker's Compensation Act was to abrogate the liability of a railroad pursuant to North Carolina's mini-F.E.L.A. statute.

The only distinction in this case, as opposed to a claim which does not involve a state agency is that the proper forum for bringing this tort action is in the North Carolina Industrial Commission, pursuant to the North Carolina Tort Claims Act. Consequently, it is concluded as a matter of law that defendant's Motion to dismiss this action based upon the theory that this plaintiff's sole remedy is under the

North Carolina Worker's Compensation Act should be denied.

IT IS THEREUPON ORDERED that defendant's Motion to dismiss this action based upon the theory that the plaintiff's remedy in this cause is limited to the provisions of the North Carolina Worker's Compensation Act is DENIED.

O R D E R

Defendants also moved to dismiss plaintiff's cause of action based upon a contention that the defendant was engaged in interstate commerce and that therefore any action brought by the plaintiff must be brought under the Federal Employer's Liability Act as opposed to N.C.G.S. 62-242. It is further contended in this Motion that inasmuch as this claim is properly brought pursuant to the Federal

Employer's Liability Act that this Commission has no jurisdiction regarding this matter under the North Carolina Tort Claims Act.

Based upon the matters of record, it is found as a fact that the defendant has not proven that it was involved in interstate commerce at the time of this accident. The evidence in this matter indicates only that the operation of the railway facility was occurring at the time of the accident, but does not prove for what purpose the railway operation was being conducted that day.

Based upon this it is concluded as a matter of law that defendant's Motion to dismiss this action should be denied. It is noted that defendant's contentions raised in its Motion to

dismiss in this regard would have greater weight had there been a showing that at the time in question, defendant was engaged in interstate commerce. Certainly, one could assume this, but absent proof in this regard there is a presumption that a railway activity which does operate entirely intrastate, such as the defendant, is engaged only in intrastate commerce.

IT IS THEREFORE ORDERED that defendant's Motion to Dismiss this action as based upon these contentions is DENIED.

* * * * * ** * * * * * * * *

The undersigned finds as facts and concludes as a matter of law the following which were entered into by the parties at the hearing as

STIPULATIONS

1. Defendant, North Carolina Ports Railway Commission, is an agency of the State of North Carolina.

2. Plaintiff, Richard Laughinghouse, on January 31, 1985, was an employee of defendant.

3. Plaintiff's Exhibit A which consists of three pages of office notes from plaintiff's treating physician is admitted into evidence.

4. Plaintiff's Exhibit B which is a tabulation of medical expenses is admitted into evidence.

Based upon all of the competent evidence in the record, the undersigned makes the following additional

FINDINGS OF FACT

1. Plaintiff was employed by defendant since the fall of 1981 and served

in positions at various times as a conductor, brakeman, switchman and engineer. At the time of his accident, he was classified as a brakeman, switchman and engineer.

2. Plaintiff's primary duties consisted of assuring that freight cars were lined up in the proper order, connecting freight cars together by manipulating their coupling devices and organizing train traffic for movement within and exiting the North Carolina Ports Authority facility. In this regard, plaintiff was involved in the movement of engines and freight cars. This included throwing switches which were located on the railway lines.

3. On January 31, 1985, plaintiff came to his work station at 8:00 a.m. On this day it was raining which

created a slick condition on the various switches that are part of the railway system.

4. There are approximately twenty switches on the North Carolina Ports Authority property. There are different types of switches. The particular switch in question was a pit switch. This is named in this way because the switch is physically located in a pit located in the ground so that when the switch is in a locked position, all of the working mechanisms are below ground surface.

5. Plaintiff was attempting to throw the switch in question to change the position of the tracks. In doing so, he pulled the handle up to approximately an 11 o'clock position. This is necessary in order to prepare to push

the switch over to the other side, thereby changing the direction of the tracks. In attempting to complete a throwing of the switch and changing the direction of the tracks, plaintiff placed his foot on the switch in order to push it. He felt that this was necessary given the resistance that the switching lever was offering. It was very stiff and hard to throw. He had tried to operate this particular switch approximately two days earlier and found it difficult to throw at that time. At that time, it required the assistance of another person to help him throw the switch.

6. In trying to push the switch, his foot slipped off of the lever causing his right leg to be twisted. He experienced pain and difficulty with

this knee from this time forward. His general problems consisted of soreness over the medial aspect of the joint with a grinding sensation and with occasional catching. This knee had a tendency to buckle and give way under him. He had significant pain in trying to put weight on this knee.

7. Plaintiff had a prior history of difficulty with his right knee. He had had a meniscectomy in 1979 in Denver, Colorado. Plaintiff had had no difficulty with that knee since that operation.

8. Plaintiff's treating physicians performed arthroscopic surgery in approximately February, 1987. The expenses for medical treatment for the plaintiff were in the amount of $4,960.83.

9. Since the accident, plaintiff continues to experience significant difficulty with his leg which has not resolved entirely, and retains a 20% impairment of his right leg of which 10% is attributable to this accident.

10. The pit switch in question is normally covered by a metal place which prevents trash and debris from falling into the pit. This metal plate was missing from this switch. A build up of trash and debris could adversely affect the operation of the switch making it more difficult to throw than was necessary. The switch at the time of this accident was difficult to push. This was the reason that plaintiff had to use his foot in pushing the switch rather than throwing it with the strength of his arms.

11. The maintenance of the switches of the railway system in the North Carolina States Ports Authority was the responsibility of the North Carolina States Ports Authority which owned the tracks including the switches. If difficulties were observed with a switch or there was a need for maintenance, this would be reported to the yard master who was an employee of the North Carolina State Ports Railway Commission. The yard master would in turn report it to the maintenance crew for the North Carolina State Ports Authority. Employees of the North Carolina Ports State Authority had the responsibility of maintaining the switches. The named employee in this Affidavit, Steven Dudley was a yard master employed by defendant who

would routinely report needs for repair and maintenance to the maintenance crew for the North Carolina State Ports Authority.

12. The named employee of the defendant was not negligent in discharging his duties, which included simply passing along to the maintenance crew for the North Carolina State Ports Authority the need for maintenance. Any negligence or failure to maintain which existed in this case, would have been the failing of employees who are not named in this Affidavit and who worked for the North Carolina State Ports Authority, which is not named in this Affidavit.

Based upon the foregoing stipulations and findings of fact, the undersigned makes the following

CONCLUSIONS OF LAW

The employee of the defendant whose alleged negligence forms the basis for plaintiff's claim was in no way negligent in the performance of his duties. Additionally, the agency of the State of North Carolina, against whom the claim is asserted, in no way was responsible for the maintenance and repair of the switch which formed the basis for plaintiff's claim. N.C.G.S. Section 143-297.

Based upon the foregoing findings of fact and conclusions of law, the undersigned makes the following

A W A R D

1. Plaintiff's claim must be and is hereby denied.

2. This case shall be removed from the hearings docket of the North Carolina Industrial Commission.

3. Each side shall pay their own costs.

O R D E R

Appearing to testify in this cause was Irl Wentz, M.D. Based upon the time consumed by Dr. Wentz in testifying in this matter, it is found that the entry of the following Order is appropriate.

IT IS THEREUPON ORDERED that defendant shall pay to Irl Wentz, M.D., an expert witness fee, in the amount of $150.00.

s/Ernest C. Pearson
Chairman

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. NO. TA-10699

RICHARD H. LAUGHINGHOUSE,
Plaintiff

v.

N.C. PORTS RAILWAY
COMMISSION,
Defendant

DECISION AND ORDER
FOR THE FULL COMMISSION

BY

J. RANDOLPH WARD
COMMISSIONER

FILED: JANUARY 4, 1990

This matter was reviewed by the Full Commission on July 18, 1989 in Raleigh upon the appeal of the plaintiff from the Decision and Order by former Chairman Ernest C. Pearson, sitting as hearing officer, filed December 30, 1988.

A P P E A R A N C E S

Plaintiff: DeBank, McDaniel, Holbrook & Anderson, Attorneys, Raleigh, N.C.; William E. Anderson appearing.

Defendant: Johnson & Lambeth, Attorneys, Wilmington, N.C.; Robert White Johnson appearing.

* * * * * * * * * * * * * * * * *

The former Chairman dismissed this claim because the plaintiff failed to allege the name an agency of the State employee who was responsible for the allegedly dangerous conditions that caused his injuries, applying case law holding this to be a fatal failure to comply with N.C.G.S. Section 143-297(2) which lists for inclusion in the affidavit, "The name of the department, institution or agency of the State against which the claim is asserted, and the name of the State employee upon whose negligence the claim is based; ..." Floyd v. Hwy. Comm'n, 241 N.C. 461, 85 S.E.2d 703 (1955); Woolard v.

N.C. Dept. of Transportation, 93 N.C. App. 214, 219, 377 S.E.2d 267 (1989), cert. denied, 325 N.C. 230 (1989). Thus we affirm. However, we have grave misgivings about this interpretation of the law, and take this occasion to respectfully state our views.

In the present case, this interpretation of the law prevents the injured plaintiff from recovering for the proven culpable negligence of the defendant State because he failed to name the correct employee from the pair of State agencies that worked hand-in-glove to maintain the railroad switch that caused plaintiff's injury. Defendant had full notice of the time, place, and people involved in the incident upon which he based his claim. Both implicated employees testified at

the hearing. The other agency, the State Port's Authority, is mentioned twice in the affidavit - as the location and the co- or alternate owner/ operator of the defective switch. Although the case had a number of challenging legal issues, in the mind of the finder of fact it came down to a question of whether Richard Dudley of the named agency, the N.C. Port Railway Commission, who had a duty to report the malfunctioning switch, or George Kitrell of the N.C. State Ports Authority, who had a duty to repair it when reported, were negligent in seeing to the repair that would have prevented plaintiff's injury. It was a close question. The Railway Commission's general manager testified that "...if we could not take care of it then you

would report it to the Port Authority. .... On some occasions the employee was there and a maintenance man was there we'd tell them right there. Richard could just as easily have told the employee if there was a State employee there at the Port Authority too --- you know, we've got a problem with the switch and it needs to be adjusted." The testimony at the hearing did not dissuade the plaintiff that Richard Dudley was the negligent employee, and he did not move to amend his complaint to name Kitrell and the N.C. State Ports Authority. The former Chairman concluded that Dudley was not negligent, and that, "Any negligence ... would have been the failing of employees... who work for the N.C. State Ports Authority..."

The purpose of the quoted section of the statute "is to enable the department of the State against which the claim is made to investigate, not all its employees, but the particular ones actually involved". Tucker v. North Carolina State Hwy. & Pub. Works Comm'n, 247 N.C. 171, 175, 100 S.E.2d 514 (1957), citing Floyd at 464. While the waiver of sovereign immunity in Chapter 143, in derogation of the common law, is to be strictly construed (Floyd, at 464), "The requirement of an affidavit delineated in G.S. Section 143-297 is not a rule governing liability or the limits of liability of the State and its agencies. Rather, it is a procedural rule." Teachy v. Coble Dairies, Inc., 306 N.C. 324, 333, 293 S.E.2d 182 (1982). Thus a plaintiff is

permitted to amend his complaint to conform to the evidence at hearing showing the negligence of a particular employee. Mason v. Hwy. Comm'n, 7 N.C. App. 644, 647, 173 S.E.2d 515 (1970). This is consonant with the purpose of the subsection recited above, and with the fact that it is the State, and not the employee, who is the defendant. Any recovery against the employee must be sought in the General Court of Justice. Worth v. Bracey, 258 N.C. 505, 507-08, 128 S.E.2d 810 (1963). Having granted the substantive right to recover from the State where the legal doctrine of respondeat superior would make it, "if a private person, ... liable to the claimant in accordance with the laws of North Carolina" (Section 143-291), the Legislature surely did not intend to

limit it to instances when by happenstance the injured party knew or could discover which of a group of employees working in concert was culpable in the breach of duty. As is pointed out in the Whichard case cited with favor in the seminal Floyd decision, the common law requires only that the plaintiff show that a master's servant caused injury, not the given name of the servant. Whichard v. Lipe, 221 N.C. 53, 55, 19 S.E.2d 14 (1942). Read in pari materia with that initial section of the Article setting forth the policy and purpose of the Act, it would seem that Section 143-297 should be seen as a procedural instruction, and not the super-imposition of a requirement of proof not demanded of the most sophisticated litigants in the highest trial

divisions of the State and Federal courts.

The idea that Section 143-297 introduces such a unique and, in our experience, frequently fatal pleading requirement is particularly jarring when the context is considered. The subject section appears to describe - and in fact has led to the creation of - a simple, one page, fill-in-the-blanks affidavit with which citizens may make claims of a hundred thousand dollars or less before the Industrial Commission. Most are filed by pro se plaintiffs. "No formal pleadings are required in a proceeding under our State Tort Claims Act. It is only necessary in order to invoke the jurisdiction of the Industrial Commission for the claimant... to file with the

Industrial Commission an affidavit in duplicate setting forth the material facts, as required by G.S. 143-297. This statute does not require the use of legal, technical or formal language, and the claimant is not held to the strict rules of pleading applicable to common law actions." Branch Banking & Trust Co. v. Wilson County Board of Education, 251 N.C. 603, 607-08, 111 S.E.2d 844 (1960). The undersigned seriously doubts whether the Legislature, utilizing plain language to describe this "informal pleading" (Id., 608) foresaw that it would be interpreted so literally as to narrow the relief offered without qualification in the preceding sections. The Commission has been criticized for an interpretation of the subject subsection that

"defeated the Legislative purpose by replacing the rule of strict construction with one of technical stringency." Northwestern Distributors, Inc. v. Dept. of Transportation, 41 N.C. App. 548, 550, 255 S.E.2d 203, cert. denied 298 N.C. 567 (1979). "To find that the abrogation of sovereign immunity impels such a strict construction as to thwart the obvious Legislative intent and render meaningless in act of the General Assembly would be anomalous, aberrant, and abhorrent.." (Cites omitted) Teachy, at 331.

Floyd held that the purpose of Section 143-297(2) was to permit the State to focus its investigation on the particular persons and acts that were allegedly negligent. Manifestly, the plaintiff's affidavit serves that end.

In this case, the State was well informed about the persons and agencies involved, and there is no reason why the kind of notice defendant had here would not suffice in tort claims generally. Once given the time and place, the name of the State employee involved is uniquely within the ability of the defendant to determine from its records and personnel. It is axiomatic that a plaintiff is not allowed to file suit in order to begin a "fishing expedition" through discovery. In 1975, North Carolina eliminated the former Rule 27(b) of the North Carolina Rules of Civil Procedure allowing pre-trial discovery with which to prepare a complaint. Those government records that are public are voluminous and

rarely specific enough to allow identification of a specific employee in circumstances such as these.

The notice purpose of the subject statute has been recited numerous times since Floyd, and there is no other rationale offered for a rule that seems to the undersigned to clearly extend beyond that purpose. Thus we can hope that the Legislature or the Court charged with the ultimate responsibility for interpreting its statutes will change this judge-made rule. As Chief Justice Sharp quoted in Rabon v. Hospital, "'Stare decisis is not a rule of law but is a matter of judicial policy.' ...As Stacy, J. (later C.J.), said... 'There is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until

it is settled right.'" 269 N.C. 1, 15, 20-21, 152 S.E.2d 485 (1966).

We are persuaded that justice and the Legislative intent of the Tort Claims Act would best be served by returning this matter for trial on the issue of whether the State was liable, as a private enterprise might be, for claimant's injuries. However, it is our duty to apply the statutes as interpreted by the Appellate Courts.

We have rendered similar opinions today in Roberson v. N.C. Dept. of Administration, TA-9264 and in Varner v. Guilford Technical Community College, TA-11555, wherein the application of the prevailing interpretation defeated the claims of plaintiffs who were unable to identify by name the

negligent State employees responsible for their injuries.

The undersigned have reviewed the record with reference to the errors alleged and find no reversible error.

In view of the foregoing, the Full Commission AFFIRMS and ADOPTS as its own the Decision and Order as filed.

Each side shall pay its own costs.

s/ J. RANDOLPH WARD
COMMISSIONER

CONCURRING:

s/ WM. H. STEPHENSON
CHAIRMAN

s/ J. HAROLD DAVIS
COMMISSIONER

NO. 9010IC445

NORTH CAROLINA COURT OF APPEALS

Filed: 15 January 1991

RICHARD H. LAUGHINGHOUSE,
Appellant

v.

STATE OF NORTH CAROLINA, ex rel
NORTH CAROLINA PORTS RAILWAY
COMMISSION,
Appellee

Indus. Commission
I.C. No. TA-10699

Appeal by plaintiff from a judgment entered 18 July 1989 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 December 1990.

This action for personal injuries arose out of an on-the-job injury to a railroad worker employed by the State of North Carolina at the Ports

Authority in Morehead City. The action was commenced by filing an Affidavit under the Tort Claims Act. N.C. Gen. Statute Section 143-291 (1990), with the Industrial Commission. The matter was heard by former Chairman Ernest C. Pearson, sitting as hearing officer, on 8 August 1988. The Decision and Order by Chairman Pearson concluded that the Industrial Commission had jurisdiction, but that the employee and specific agency named in the Affidavit were not negligent. See N.C. Gen. Stat. Section 143-297 (1990). Appeal was taken to the Full Commission.

A Decision and Order from the Full Commission was filed 4 January 1990, affirming the dismissal based on plaintiff's failure to allege the state agency and the employee who was

responsible for the alleged negligence, but the Commission noted "grave misgivings about this interpretation of the law..." plaintiff appealed.

DeBank, McDaniel & Anderson, by William E. Anderson, for plaintiff appellant.

Johnson & Lambeth, by Robert White Johnson and Maynard M. Brown, for defendant apppellee.

ARNOLD, Judge.

Plaintiff brings forth two assignments of error, and defendant, one. First we examine defendant's claim that the Industrial Commission erred by failing to dismiss plaintiff's claim for lack of subject matter jurisdiction.

Plaintiff was injured on 31 January 1985, while throwing a "pit switch," a device set in the ground that when

operated switches railway traffic from one track to another. This particular switch had been improperly maintained and had become defective. Maintenance personnel had been notified that the switch needed repairing, but no action had been taken.

Throwing a pit switch involves a manual maneuver using one's arms and body weight. When plaintiff attempted to throw the switch on this particular occasion, the switch stuck. Plaintiff exerted himself in an effort to throw the switch and severely injured his knee. As a result of the injury, plaintiff is partially, permanently disabled and can no longer perform the duties necessary to work as a railway employee. Plaintiff was forty-seven years old at the time of his injury.

The Industrial Commission concluded the State was guilty of negligence in failing to maintain the switch, but refused to enter judgment on the technical grounds that the plaintiff failed to identify in the Affidavit the negligent State employee and agency. See G.S. Section 143-297; Floyd v. N.C. State Highway and Pub. Works Commission, 241 N.C. 461, 85 S.E.2d 703 (1955); Woolard v. N.C. Dept. of Transp., 93 N.C. App. 214, 377 S.E.2d 267, cert. denied, 325 N.C. 230, 381 S.E.2d 792 (1989). The Industrial Commission concluded that the negligent employees were employees of the State Ports Authority, rather than the Ports Authority Railway Commission. The claim was dismissed because the

Affidavit named the latter instead of the former.

We agree with the Industrial Commission that an often unfair and harsh rule has evolved in our case law whereby a plaintiff's pleadings may be fatal to his claim if he fails to properly identify the negligent State employee and agency in the Affidavit used to initiate an action with the Industrial Commission. We have previously voiced our criticism of this rule. See Northwestern Distributors, Inc. v. N.C. Dept. of Transp., 41 N.C. App. 548, 550, 255 S.E.2d 203, 205, cert. denied, 298 N.C. 567, 261 S.E.2d 123 (1979). Nevertheless, like the Commission, we are not the proper body to initiate such a change; it is for our General Assembly or Supreme Court.

Furthermore, this case is not the appropriate vehicle to institute this change. In our view, the Industrial Commission erred in failing to dismiss plaintiff's claim because it lacked subject matter jurisdiction. Early in this century, Congress enacted the Federal Employers' Liability Act (FELA) to provide a national law covering injuries sustained by railway employees that were the result of the negligence of their employers. See 45 U.S.C.A. Section 51 (1986). It is clear that the FELA was created to provide a national law that would preempt varying state laws covering injuries to railway employees engaged in interstate commerce. New York Cent. Ry. Co. v. Winfield, 244 U.S. 147, 61 L.Ed. 1045 (1917). "In rulings dating from the

enactment of the federal statute, it has invariably been stated that the FELA superseded state law insofar as the two cover the same field." Annotation, 97 L.Ed. 403, 404. Our state Supreme Court has recognized that where the FELA and state law overlap, the state law remedies are preempted, "because the Federal Statute is exclusive and supersedes the right of action under the State law." Renn v. Seaboard Air Line Ry. Co., 170 N.C. 176, 183, 86 S.E. 964, 967 (1915), aff'd, 241 U.S. 290, 60 L.Ed. 1006 (1916). The FELA applies when an injury occurs to "(a)ny employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially,

affect such commerce as above set forth..." 45 U.S.C.A. Section 51. Several cases have found that state port railroad operations, such as the one involved in this case, are interstate in nature. The U.S. Supreme Court had held that the state authority operating railroads at the Alabama state docks was an interstate carrier. Parden v. Terminal Ry. of Alabama State Docks Dept., 377 U.S. 184, 12 L.Ed.2d 233 (1964), rev'd on other grounds, Welch v. Texas Dept. of Highways and Public Transp. 483 U.S. 468, 97 L.Ed.2d 389 (1987). The Fourth Circuit Court of Appeals has found this railway operations of our State ports were "a link in interstate and foreign carriage of shipments controlled by ship and railway companies." International

Longshoreman's Ass'n., AFL-CIO v. N.C. Ports Auth., 463 F.2d 1, 4 (4th Cir.), cert. denied, 409 U.S. 982, 34 L.E.2d 245 (1972).

Furthermore, the evidence before the Commission supports a finding that plaintiff was involved in interstate commerce when he was injured on 31 January 1985. The testimony indicates that at the time of the injury plaintiff was engaged in transporting lumber from the Soviet Union. Based on this case law and evidence, we hold that the Industrial Commission erred in failing to dismiss this action for lack of subject matter jurisdiction.

This result makes it unnecessary for us to examine plaintiff's assignments of error. For the foregoing

reasons, the judgment dismissing plaintiff's claim is

Affirmed.

Judges PARKER and ORR concur.

No. 79P91 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * *

RICHARD H. LAUGHINGHOUSE,
Plaintiff

v.

STATE OF NORTH CAROLINA, ex rel
NORTH CAROLINA PORTS RAILWAY
COMMISSION

From Industrial Commission
(9010IC44)

* * * * * * * * * * * * * *

ORDER

Upon consideration of the petition filed by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the court in conference, this the 2nd day of May 1991.

s/ Whichard, J.
For the Court"

WITNESS my hand and seal of the Supreme Court of North Carolina, this the 6th day of May 1991.

CHRISTIE SPIER PRICE
Clerk of Supreme Court

s/Peggy N. Byrd
Assistant Clerk

FEDERAL EMPLOYEES' LIABILITY ACT
(45 U.S.C.S. Sec. 51 et seq)

Sec. 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the

surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth

shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Sec. 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents;

and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 54. Assumption of risks of employment

In any section brought against any common carrier under or by virtue of any of the provisions of this Act (45 USCS Sec. 51 et seq.) to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the

risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 55. Contract, rule, regulation, or device exempting from liability; setoff

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act (45 USCS Sec. et seq.), shall to that

extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act (45 USCS Sec. 51 et seq.), such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 56. Actions; limitation; concurrent jurisdiction of courts

Under this act (45 USCS Sec. 51 et seq.) an action may be brought in a circuit (district) court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the

defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act (45 USCS Sec. 511 et seq.) shall be concurrent with that of the courts of the several States.

Sec. 57. Who included in term "common carrier"

The term "common carrier" as used in this act (45 USCS Sec. 51 et seq.) shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Sec. 58. Duty or liability of common carriers and rights of employees under other Acts not impaired

Nothing in this act (45 USCS Sec. 51 et seq.) shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

Sec. 59. Survival of right of action of person injured

Any right of action given by this act (45 USCS Sec. 51 et seq.) to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

NORTH CAROLINA "LITTLE F.E.L.A."
(N.C.G.S. 62-242)

Sec. 62-242. Liability of railroads for injuries to employees; fellow-servant rule; defective machinery; contributory negligence; assumption of risk; contracts void.

(a) Any servant or employee of any railroad company operating in this State who shall suffer injury to his person or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company, by the negligence, carelessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any

employee of such company to waive the benefit of this section shall be null and void.

(b) Every common carrier by railroad shall be liable in damages to any person suffering injury while he is employed by such carrier, or in the case of the death of such employee, to his or her personal representative, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

(c) In all actions hereafter brought against any common carrier by

railroad to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, however, that no such employee who may be injured or killed shall have to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(d) In any action brought against any common carrier under or by virtue of any of the provisions of this

section to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee, or the death or injury was caused by negligence.

(e) Any contract, rule, regulation or device whatsoever, the purpose and intent of which shall be to enable any common carrier by railroad to exempt itself from any liability created by this section, shall to that extent be void: Provided, that in any action brought against such common carrier, under and by virtue of any of the provisions of this section, such common

carrier may set off therein any sum it has contributed or paid to any insurance or relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which such action was brought.

(f) The provisions of this section relating to liability for damages shall also apply to logging roads and tramroads.

(g) The term "common carrier" as used in this section shall include the receiver or receivers, or other persons or corporations charged with the duty of the management of the business of a common carrier. The term "employee" or "servant" as used in this section shall include any person carried on the payroll of such railroad company and

required to be on its property regardless of whether such person is receiving compensation at the time or not. (1897 (Pr.), c.56; Rev.,s. 2646; 1913, c.6, ss. 1, 2, 3, 4, 5; 1915, c.256; 1919, c.275; S.S., ss. 3464, 3465, 3466, 3467, 3468, 3469, 3470; 1947, c.916; 1963, c.1165, s.1.)